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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL MONTGOMERY,

Plaintiff,

v.

WAL-MART STORES, INC. et al.

Defendants.

Case No. 12-CV-3057 JLS-DHB

**JOINT MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE RE
FURTHER RESPONSES TO
REQUESTS FOR PRODUCTION
BY DEFENDANT HOME DEPOT
U.S.A., INC.**

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**JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE RE FURTHER RESPOSNES TO
REQUESTS FOR PRODUCTION BY DEFENDANT HOME DEPOT, U.S.A., INC. - 1**

INTRODUCTION

This discovery dispute arises from written Requests for Production of Documents served by Plaintiff on March 27, 2015 (*See Exhibit “1”*). On May 7, 2015, Defendant Home Depot served its Responses to Plaintiff’s Requests for Production, which but did not produce any documents at that time. (*See Exhibit “2”*). Defendant has since produced 589 pages of document; however, Plaintiff contends the documents are not responsive.

A number of deadlines including expert disclosures on July 10, 2015 and close of discovery on September 4, 2015 are fast approaching. The parties have met and conferred and were unable to resolve the issues. The parties require judicial intervention to resolve this dispute.

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PLAINTIFF'S POINTS AND AUTHORITIES

A. DEFENDANT MUST BE COMPELLED TO PRODUCE ALL DOCUMENTS IT IS NOT WITHHOLDING SUBJECT TO OBJECTION

Defendant's repeated refusal to provide Plaintiff with discovery is a complete abuse of this Court's discovery procedure. For the past few months, Defendant has made continual promises both to this Court and to Plaintiff that it would be producing documents shortly and therefore this Court's intervention was not necessary. However, a recitation of Defendant's history of delay tactics and continual refusal to provide documents makes it clear that this Court's intervention is necessary. As the Court will remember, this is the second motion that Plaintiff has filed because of Defendant's unwillingness to participate in discovery. At first Defendant refused to produce a corporate representative and relevant documents. *See* Doc. 115. Although Defendant has agreed to produce a corporate representative on June 24, 2015, it has yet to provide any responsive documents so that Plaintiff can prepare for the upcoming deposition.

Defendant has employed the same strategy as described when responding to Plaintiff's written discovery. Plaintiff served Defendant written discovery on March 27, 2015. Plaintiff gave Defendant multiple extensions to complete this discovery based on Defendant's representation that to prepare meaningful responses it needed more time to gather information and documents. On May 7, 2015, Plaintiff received Defendant's discovery "responses," but contrary to Defendant's representation, there was no substantive information provided and no documents produced, only objections. (*See Exhibit "2"*). Plaintiff immediately contacted Defendant regarding the inadequacy of its responses. Defendant's Counsel, Mr. Goodman assured counsel in email that he would be providing documents on May 11, 2015:

1 Ken: **We will be producing documents to you today. ...**

2
3 (See **Exhibit “3”**). (emphasis added). Despite Defendant’s representation, it
4 did not produce any documents on May 11, 2015. Since that time, Plaintiff’s
5 counsel repeatedly contacted Defendant’s counsel regarding when it would
6 produce documents and Defendant’s counsel continued to avoid giving a precise
7 answer and instead suggested that the parties hire a discovery master or meet and
8 confer again. The parties once again participated in meet and confer sessions.
9 During the meet and confer, Defendant’s counsel asked that Plaintiff wait before
10 filing any motion with the Court and assured Plaintiff that it would finally produce
11 documents.

12
13 Tim: Progress has been made, but the people who can give the green
14 light on some of this stuff are not in the office today. Realistically, I
15 think maybe Monday, but probably Tuesday would be the date for
16 production. (See **Exhibit “4”**)

17 At last under the threat of this Joint Motion, on June 2, 2015 Defendant
18 provided its first production of documents. This production of documents was
19 nothing more than a meaningless gesture to give the appearance that Defendant
20 was engaging in discovery. In reality, the production was not responsive to any
21 discovery request and consisted of documents that Plaintiff was already in
22 possession of including documents from the CFR Insurance deposition taken *in*
23 *this case* and documents from Plaintiff’s previous lawsuit against a home insurance
24 policy. Then on June 3, 2015, Defendant produced a second set of documents,
25 which was equally as unresponsive. The June 3, 2015 production consisted of a

1 complaint from a separate case, which was filed in 2014.¹ To date, Defendant has
 2 provided only 589 pages of documents none of which bear on Home Depot's
 3 liability in this case.

4 Now, Defendant claims that it will be producing more documents but in
 5 order to produce them, Defendant's counsel needs client approval and Plaintiff
 6 needs to sign a protective order. While Defendant continues to claim that it will
 7 produce documents in the "near future," Plaintiff cannot rely on this representation.
 8 Without this Court's intervention, these delay tactics will never end. Defendant
 9 will continue to manufacture excuses about why it has not produced documents.

10 **B. Defendant's objections do not provide a basis to withhold documents**

11 In addition to just flat refusing to provide Plaintiff with any documents,
 12 Defendant has also claimed that it is withholding information because 1) it has not
 13 yet located the information or the client has yet to approve production; 2) post-
 14 incident information is not discoverable; and 3) the information is privileged. As
 15 described below none of these provides a basis to withhold documents. Defendant
 16 has not met its burden to justify its failure to produce responsive documents.

17 Rule 26(b)(1) provides that parties may "obtain discovery regarding any
 18 matter, not privileged, which is relevant to the subject matter involved in the
 19 pending action." Fed R. Civ. P. 26(b)(1). As the party resisting discovery,
 20 Defendant bears both the burden of "show [ing] that discovery should not be
 21 allowed, and...the burden of clarifying, explaining, and supporting its objections."
 22 *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998).

23
 24
 25
 26 ¹ The production of the 2014 complaint is surprising in light of Defendant's claim that post-
 27 incident information is not discoverable.

1 **1. Defendant’s boilerplate objections should be overruled.**

2 Defendant relies on mostly boilerplate objections to circumvent their
3 discovery obligations. For instance, Defendant’s Response to Request No. 3 states:

4
5 Objection. The request: (1) is an attempt to elicit irrelevant information;
6 (2) is not reasonably calculated to lead to the discovery of admissible
7 evidence; (3) is unreasonably cumulative and duplicative; (4) is unduly
8 burdensome and oppressive in that burden and expense of obtaining the
9 documents demanded outweighs any nominal benefit, if any, taking
10 into account the case's needs, the amount in controversy, the parties'
11 resources, and the importance of the issue; (5) the request is vague and
12 ambiguous as to the terms "training information, safety information,
13 and product hangars, and 'other' information that you distributed" as the
14 terms are undefined; (6) the request is overbroad in time and scope; (7)
15 the request is not reasonably particularized; (8) the request is
16 conjunctive and/or disjunctive; and (9) equally available to
17 propounding party. (See **Exhibit “2”**).

18 Some variation of this objection is contained in Response to Requests Nos.
19 4-8; 11-13; 15-45. Defendant’s unexplained and unsupported objections are
20 improper and should be overruled. *Mancia v. Mayflower Textile Servs. Co.*, 253
21 F.R.D. 354, 358 (D. Md. 2008) (objections that requests are “overboard and unduly
22 burdensome, and not reasonably calculated to lead to the discovery of material
23 admissible in evidence...are improper unless based on particularized facts”)

24 Plaintiff moves the Court to overrule Defendant’s objections to Plaintiff’s
25 Request for Production Nos. 3-8; 11-13; 15-45. It is unclear whether or not
26 Defendant is withholding documents based on these objections but given
27

1 Defendant has not produced documents relevant to these requests, it appears as if it
 2 is doing so. Defendant has not met its burden of justifying its objections, and the
 3 Court should overrule them and order Defendant to produce responsive documents.

4 **2. Timeliness: Defendant has looked for documents for five months.**

5 Twenty (20) of Defendant's discovery responses also contain some claim
 6 that it has not yet located responsive information. For example, Defendant states:

7
 8 Home Depot has been trying to locate these documents, but because
 9 the incident happened nearly 15 years ago and theoretically
 10 responsive documents could date back that far or farther, no
 responsive documents have yet been located.

11 Some variation of this response is contained in response to Request Nos. 1-
 12 2; 4-6; 8; 11; 14-15; 18-25; 29-30; 34-38; 41-42. Home Depot has continually
 13 represented to Plaintiff that it is looking for more documents. There has been
 14 ample time to determine whether the requested information exists or not. At this
 15 point, if Defendant cannot find responsive information it must be ordered to put in
 16 writing that it does not have the documents or at the very least, the steps it took to
 17 locate such information. Defendant's boilerplate contention that it has not located
 18 responsive documents, without explanation and without being made under oath is
 19 inadequate and non-responsive. Currently, it is possible that documents will
 20 miraculously appear in time for their use by Defendant but after discovery is done.
 21 Plaintiff moves this Court to order that Defendant produce the responsive
 22 documents or confirm under oath that such documents do not exist.

23 Additionally, Defendant has made numerous oral representations that the
 24 production is pending client approval. "Pending Client Approval" is not a valid
 25 objection to untimely producing documents. What's to approve? If the documents
 26 exist, they must be produced.

1 **3. The scope of discovery includes post-incident information.**

2 Defendant also objects to 28 of Plaintiff's discovery requests on the basis
3 that post-incident information is not discoverable. (RFP Nos. 3-8; 11-13; 15-26;
4 29-33; 35-37; 41-45). Defendant's basic position is that because Plaintiff's injuries
5 occurred in 2002, information after 2002 is not relevant to whether or not Home
6 Depot *knew* about the dangers of gasoline containers. While such information may
7 not be relevant to Home Depot's knowledge, it is relevant to a number of other
8 issues in this case. Post-incident information is relevant to causation, the defective
9 design of the gasoline container, and the feasibility of design change. This is
10 particularly true given that Defendant has contested each of these issues.

11 In this case, Plaintiff has alleged that the subject gasoline container is
12 dangerous and can cause explosions. Defendant has taken the position that gasoline
13 containers like the subject gasoline container are not dangerous and do not cause
14 explosions. *See* Def.'s Answer to Pl.'s Compl. at ¶¶ 158-160. Plaintiff has also
15 alleged that there are safer alternative designs, which would have eliminated the
16 risk of the gasoline container from exploding. Defendant has also denied this. *Id.*
17 Plaintiff has also claimed that without a flame arrestor it was foreseeable that the
18 can was defective. Defendant denies this by relying on a number of affirmative
19 defenses that the harm was unforeseeable and caused by an unreasonable use. *Id.* at
20 affirmative defense No. 13. In addition, Defendant claims that any fault was the
21 result of third parties that it had no control or right of control over. *Id.* at No. 23.

22 Plaintiff must be given access to information necessary to prove his case.
23 Plaintiff is entitled to discover information about any testing that was conducted
24 regarding the gasoline containers design defect regardless of when this occurred. It
25 does not matter whether it happened one day after the incident or one day before
26 trial. It is relevant to the issue of the defect and causation. This evidence also goes

1 to whether the product is dangerous. In *Weeks v. Remington Arms Co.*, 733 F.2d
 2 1485, 1491 (11th Cir. 1984), the Court unequivocally held that post-incident
 3 failures are potentially admissible for a multiple of reasons:

4
 5 In this appeal, Remington does not seriously dispute the admissibility
 6 of its records concerning other failures of its safety mechanism; nor
 7 could it. The relevancy of similar accident evidence has been firmly
 8 established in this circuit: Evidence of similar accidents might be
 9 relevant to the defendant's notice, magnitude of the danger involved,
 10 the defendant's ability to correct a known defect, the lack of safety for
 11 intended uses, strength of a product, the standard of care, and
 12 causation. (internal citations omitted).

13
 14 The *Weeks* Court cited *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 617
 15 (5th Cir. 1977) which held that “[w]hile an accident occurring after the one under
 16 investigation might not have been relevant to show defendant's prior knowledge or
 17 notice of a product defect, it may have been highly relevant to causation, the
 18 critical issue in this case.” These cases are examples of instances when this type of
 19 evidence was not only discoverable but admissible at trial.

20 What is most remarkable about Defendant’s objection is that the parties have
 21 stipulated in writing that in relation to the 30(b)(6) deposition, the relevant period
 22 for discoverable information is from 1997 to the present:

23
 24 Plaintiff’s Notice of Deposition of Home Depot under FRCP 30(b)(6)
 25 shall be limited to information and documents from **June 1997 up to**
 26 **the present.** *See* Doc. 116.

1 In light of its agreement to produce some of these documents in relation to
2 the deposition of its 30(b)(6) corporate representative, Defendant's unwillingness
3 to produce documents which involve post-incident events is disingenuous and is a
4 prime example of why the Court must compel Defendant to produce documents.
5 Plaintiff respectfully requests that this Court overrule Defendant's post-incident
6 objections to RFP Nos. 3-8; 11-13; 15-26; 29-33; 35-37; 41-45 and compel
7 production of all documents responsive to those requests.

8 **4. Defendant has no basis for sustaining its privilege objection.**

9 Defendant objected to forty requests on the grounds that responsive material
10 is privileged, proprietary, or confidential, but failed to provide a privilege log
11 identifying documents responsive to these requests. (RFP Nos. 2, 3, 5-38; 40-45).
12 Similarly, Defendant objected to three requests on the basis of the attorney-client
13 privilege and/or work-product doctrine without providing a privilege log. (RFP
14 Nos. 9-11). Defendant's privilege objections are inadequate since it failed to
15 identify specific documents that are being withheld on the basis of privilege. As
16 such, Defendant has expressly violated the Rule 26 requirement that parties
17 describe the nature of the documents withheld on the privilege grounds. *See* Fed.
18 R. Civ. P. 26(b)(5). To the extent that Defendant is objecting based on privilege,
19 Plaintiff moves this Court to order Defendant to provide a privilege log for each
20 document it is withholding and the basis for which the privilege exists

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DEFENDANT'S POINTS AND AUTHORITIES

Plaintiff asserts that Home Depot has refused to produce any documents. This is blatantly false. Home Depot has produced 589 pages of non-privileged documents and agreed (quite some time ago) to produce additional documents once a protective order has been entered, as was represented in Home Depot's discovery responses. Counsel have agreed upon a stipulated protective order, which has been signed and filed with the court. Once it is entered by the court Defendant will produce additional documents. In addition, Defendant continues to search for potentially responsive and non-objectionable documents and will produce any such documents if any are located.

Plaintiff seeks documents going back more than 20 years, the vast majority of which simply do not exist. It is disingenuous for Plaintiff to say that Defendant was unwilling to participate in filing a joint motion. Plaintiff's counsel sent Defense counsel a 15-page draft motion late on Friday, June 5, 2015, in contravention with this Court's 10 page-limit on points and authorities. After spending significant time wading through the proposed motion, defense counsel inquired which sections of the 15-page Motion would be removed, but no response was received by Plaintiff's counsel and they subsequently filed a modified version of the Motion. Plaintiff states that defense counsel claimed to be "too busy" to provide points and authorities, which is simply a misrepresentation, as reflected in Plaintiff's own exhibits.

Plaintiff's counsel repeatedly argues that Defendant has yet to provide Plaintiff with "meaningful" documents, but the fact of the matter is that many of the documents that Plaintiff's counsel *hopes* exist, i.e. a "smoking gun," simply do not exist because Home Depot was not the designer or manufacturer of this product and had no notice of the allegedly dangerous condition that Plaintiff claims caused

his incident.

I. ARGUMENT

A. PLAINTIFF'S DEMAND TO PRODUCE ALL DOCUMENTS NOT BEING WITHHELD UNDER PRIVILEGE.

Despite Plaintiff's contention that Home Depot has been promising to produce these documents for five months, the document demands at-issue in this Motion were served on Home Depot only 2.5 months ago, at the end of March, 2015. Since then, Home Depot has been searching through 20+ years of information to determine if it even has responsive documents,² and in the meantime has produced nearly 600 pages of responsive and non-confidential documents.

Home Depot is not sure how those 589 pages of documents are "unresponsive," as Plaintiff claims. For example, Plaintiff asked for documents reflecting safety/liability regarding gas can (RFPD 8), documents regarding Blitz cans (RFPD 11), consumer complaints about Blitz cans (RFPD 33), etc., and Home Depot produced copies of multiple depositions taken in Plaintiff's prior lawsuit against the homeowners where this incident occurred, copies of minor's compromises of other children involved in this incident, copies of a deposition and exhibit regarding insurance coverage related to this case, copies of an announcement from the manufacturer about going out of business due to gas can lawsuits, copies of a recall notice for a Blitz gas can (not this model), and copies of two post-incident lawsuits against Home Depot involving gas cans. It is not surprising that more documents do not exist as Home Depot was not the

² The corporate representative deposition and accompanying 30(b)(6) document demands are not the subject of this motion (they were addressed in a prior Motion), even though they are referenced. Even so, while as a matter of professional courtesy a party might produce records requested via deposition notice in advance of that deposition, ultimately a party has no obligation to produce those documents in advance.

1 manufacturer or designer of the gas can at issue and had no notice of the condition
2 Plaintiff claims caused his incident.

3 In addition to these 589 pages of responsive documents, Home Depot has
4 repeatedly advised Plaintiff's counsel that it has additional documents ready to be
5 produced once a protective order is entered. Despite repeated email reminders
6 about this, it was not until the afternoon of June 12th that Plaintiff's counsel finally
7 responded by providing a draft protective order they found acceptable. Once this
8 is entered by the court, additional responsive documents will be produced. Had
9 Plaintiff's counsel responded earlier by agreeing to a protective order, those
10 additional documents would have been produced long ago. In addition, if
11 Defendant's continued effort to search for documents going back more than 20
12 years results in responsive and non-objectionable documents, those will be
13 produced as well.

14 **B. DEFENDANT'S OBJECTIONS HAVE MERIT.**

15 Although Plaintiff contends that Home Depot's objections are unexplained
16 and without merit, the objections are actually quite self-explanatory in this
17 instance, and in any event were addressed at length during the meet and confer
18 process.

19 For instance, the "overbroad, unduly burdensome, and not reasonably
20 calculated to lead to the discovery of admissible evidence" objections are
21 appropriate given the scope of Plaintiff's request sought 20+ years of records
22 regarding many categories of information unrelated to anything material to the case
23 from a very large company, including documents from 7+ years before the incident
24 and 13 years after the incident, the vast majority of which would never constitute
25 admissible evidence.

1 Facially, these requests are objectionable, as noted, but they are also
2 explained and justified, *to wit*, that the burden of finding and producing 20 years of
3 irrelevant documents that are unrelated to material issues in this case outweighs the
4 nominal benefit, if any, that those documents might have. Other objections are
5 also explained and justified in that Plaintiff's document demands use vague,
6 overbroad, and undefined terms, such as a request for "[a]ll documents relating to
7 Blitz gas cans, excluding invoicing and/or purchase order documents." In fact, as
8 to each document demand, Home Depot identified which terms made them vague
9 and unclear. Plaintiff now attempts to make a blanket motion to strike most of
10 Defendants objections, but does not address specific objections in the context of
11 specific document demands.

12 **C. TIMELINESS.**

13 Plaintiff asserts that Home Depot has had enough time to search for these
14 documents, but Home Depot was only served with these document demands at the
15 end of March. Having 2.5 months to search 20+ years of data/documents is not
16 unreasonable, especially considering the 45 document demands served by Plaintiff,
17 the generic and overbroad language used to describe the categories of information
18 sought, and the scope of categories of documents sought. In any event, this is not
19 an objection and Defendant is not withholding documents based on any timeliness
20 argument. Defendant has produced documents and will produce additional
21 documents once a protective order is entered. However, given the breadth of time
22 and scope covered by Plaintiff's 45 document requests, Defendant's search for
23 potentially responsive documents continues.

24 **D. POST-INCIDENT DOCUMENTS.**

25 The main area of dispute between Plaintiff and Defendant relates to the
26 scope of post-incident discovery. Contrary to the assertions by Plaintiff, Defendant

1 wholly endorses the limitations agreed to by Plaintiff concerning the 30(b)(6)
2 deposition, set forth below, and takes the position that these limitations should
3 apply to the document request that is the subject of this motion.
4

5 Plaintiff's Notice of Deposition of Home Depot under FRCP

6 30(b)(6) shall be limited to information and documents from June
7 1997 up to the present which discuss, address, or mention: actual
8 or alleged safety issues or explosions with plastic consumer gas
9 cans (including complaints/claims/lawsuits alleging explosions
10 with plastic consumer gas cans); the build-up of vapors inside
11 plastic consumer gas cans that allegedly contribute to or cause
12 explosions; and the use or nonuse of flame arrestors in plastic
13 consumer gas cans.

14 Contrary to Plaintiff's assertions, Defendant agrees that post-incident
15 documents falling within the above parameters are discoverable. For example,
16 Defendant has already produced two post-incident civil complaints against
17 Defendant which allege injuries resulting from exploding Blitz gas cans. These are
18 all the post-incident claims or lawsuits against Defendant of which Defendant is
19 aware which raise such allegations. Similarly, Defendant will produce (once a
20 protective order is entered) documents reflecting or addressing actual or alleged
21 safety issues with plastic consumer gas cans and the use or nonuse of flame
22 arrestors in plastic consumer gas cans. The problem is that the 45 document
23 requests go well beyond any of that and well beyond the limitations agreed to by
24 Plaintiff's counsel for the 30(b)(6) deposition.

25 Plaintiff's entire post-incident document argument focuses on post-incident
26 claims and testing documents. Plaintiff has argued that such documents could be
27

1 “relevant to causation, the defective design of the gasoline container, and the
2 feasibility of design change.” No such documents are being withheld and therefore
3 no such documents are the subject of this motion. The dispute is that while post-
4 incident claims may conceivably be relevant, the retail price (Request No. 13) and
5 the price paid by Home Depot (Request No. 16) for each model of gas can Home
6 Depot purchased from Blitz and/or other manufacturers during each of the years
7 from January, 1995 to present are completely irrelevant. Of what possible
8 relevance is it what Home Depot paid or charged in 2014 for gas cans? These
9 requests are even more egregious by not being limited to the same or even similar
10 gas cans or even to plastic gas cans.

11 Similarly, Defendant’s post-incident internal training documents (Requests
12 Nos. 19 & 20) are irrelevant and would have no bearing on “causation, the
13 defective design of the gasoline container, and the feasibility of design change.”
14 Whether defendant complied with its own policies after the incident is not relevant
15 and does not show anything about the subject product. Nor does the cited authority
16 support Plaintiff’s position. This is particularly true as Home Depot is not the
17 product manufacturer.

18 In *Weeks*, the Georgia case cited by Plaintiff, the defendant was Remington,
19 the manufacturer/designer of the gun that misfired. Remington was not the passive
20 retailer. Further, the case only addresses “other incidents” not the litany of other
21 documents requested here by Plaintiff. The *Dollar* case, another Georgia case
22 cited in *Weeks*, similarly involved the manufacturer/designer and similarly
23 addressed “other incident” documents. Neither of these cases supports the
24 proposition that *all* post-incident documents are discoverable. Nor does other
25 relevant case law.

1 In *Miller v. Stryker Instruments*, 2012 U.S. Dist. LEXIS 70314, 2012 WL
 2 1718825 (D. Ariz. Mar. 29, 2012), a plaintiff injured her shoulder in a softball
 3 game and subsequently had surgery in 2005, which included a certain pump
 4 catheter manufactured by I-Flow. Complications arose and the plaintiff ended up
 5 suing I-Flow for strict products liability and negligence. Plaintiff attempted to use
 6 evidence discussing the efficacy, safety, and/or dangers of pain pumps, but the
 7 court deemed that post-incident evidence unrelated to the plaintiff's specific claims
 8 of dangerousness were irrelevant. (*Miller v. Stryker Instruments*, 2012 U.S. Dist.
 9 LEXIS 70314, *17, 2012 WL 1718825 (D. Ariz. Mar. 29, 2012).) Indeed, showing
 10 of substantial similarity is required when a plaintiff attempts to introduce evidence
 11 of other accidents as direct proof of negligence, a design defect, or notice of the
 12 defect. (*Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 889 (9th Cir. 1991);
 13 *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1082-83 (5th Cir. 1986);
 14 *Brooks v. Chrysler Corp.*, 252 U.S. App. D.C. 29, 786 F.2d 1191, 1195 (D.C. Cir.
 15 1986); *Borden, Inc. v. Florida East Coast Ry. Co.*, 772 F.2d 750, 754 (11th Cir.
 16 1985); *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981); *Julander v.*
 17 *Ford Motor Co.*, 488 F.2d 839, 846-47 (10th Cir. 1973). Similarly, pre-incident
 18 evidence of "dangerousness" that does not bear a high degree of similarity to the
 19 subject incident, such as evidence of recalls addressing issues different than those
 20 at issue in a case, is properly excluded, otherwise unfair prejudice can result.
 21 (*Long v. Trw Vehicle Safety Sys.*, 2011 U.S. Dist. LEXIS 119111, *10-11 (D. Ariz.
 22 Oct. 14, 2011).

23 Again, Defendant does not dispute and has agreed to produce (and has
 24 produced) documents reflecting post-incident claims and lawsuits involving
 25 allegations of exploding consumer gas cans or the use of nonuse of flame arrestors,
 26 or other documents "which discuss, address, or mention: actual or alleged safety
 27

1 issues or explosions with plastic consumer gas cans (including
 2 complaints/claims/lawsuits alleging explosions with plastic consumer gas cans);
 3 the build-up of vapors inside plastic consumer gas cans that allegedly contribute to
 4 or cause explosions; and the use or nonuse of flame arrestors in plastic consumer
 5 gas cans.” This was the limitation previously agreed to between the parties for the
 6 30(b)(6) deposition and one which should apply to all discovery.

7 Plaintiff’s motion to compel should be denied as Plaintiff is seeking
 8 documents that go well beyond the limitations agreed to for the 30(b)(6) deposition
 9 and which are not relevant to this litigation. For example:

- 10 • Request No. 4: *Post-incident* gas can labels and warnings are not relevant
 11 unless the labels/warnings have to do with flame arrestor or explosions
 12 and relate to the Blitz gas can at issue in this lawsuit. Defendant has
 13 already stated that it has not been able to locate such documents provided
 14 by Blitz;
- 15 • Request No. 6: Marketing materials from the manufacturer are irrelevant
 16 unless they have to do with flame arrestors or explosions and relate to the
 17 Blitz gas can at issue, Defendant has already stated that it has not been
 18 able to locate such documents provided by Blitz Request No. 7: Purchase
 19 agreements have nothing to do with flame arrestors, but Home Depot has
 20 agreed to produce the agreements anyway (with a protective order);
- 21 • Request Nos. 12, 13, 16, & 32: Quantities of gas cans sold (No. 12), sale
 22 price of every model gas can ever sold (No. 13), price paid by Home
 23 Depot for all gas cans (NO. 16), and profitability regarding all gas cans
 24 (NO. 32) have nothing to do with whether the lack of a flame arrestor
 25 made this gas can dangerous;
- 26 • Requests Nos. 19-20: Post-incident training documents are irrelevant to
 27

1 this case, particularly if they do not address flame arrestor safety.
 2 Defendant's post-incident training does not show or prove that the
 3 product was dangerous.

- 4 • Request No. 43: Procedures about when to stop selling a product would
 5 only be relevant if Home Depot had notice that flame arrestors should
 6 have been used before this incident and that Home Depot failed to stop
 7 selling this product, and even then only pre-incident procedures about
 8 when to stop selling a product might be relevant;
- 9 • Requests Nos. 44-45: Gas can products and accessories, such as
 10 replacement spouts and yellow caps are not relevant to whether the
 11 product is dangerous, particularly post-incident documents. In any
 12 event, to the best of its knowledge Defendant did not sell replacement
 13 spouts or yellow caps for plastic consumer gas cans.

14 As for the following document demands, unless they have to do with "actual
 15 or alleged safety issues or explosions with plastic consumer gas cans (including
 16 complaints/claims/lawsuits alleging explosions with plastic consumer gas cans);
 17 the build-up of vapors inside plastic consumer gas cans that allegedly contribute to
 18 or cause explosions; and the use or nonuse of flame arrestors in plastic consumer
 19 gas cans," the documents would exceed the scope of an already stretched
 20 interpretation of what might constitute permissible discovery, the documents
 21 would be irrelevant, the information would not be admissible at trial, and the
 22 requests for them are unduly burdensome, oppressive and overbroad. Examples of
 23 these overbroad requests are:

- 24 • All preferences, requirements, and/or specifications for all gas cans
 25 (RFPD 5).
- 26 • Post-incident documents regarding Blitz's marketing materials (RFPD 6);

- 1 • Safety/liability regarding gas cans, in general (RFPD 8);
- 2 • All documents regarding Blitz gas cans in general (RFPD 11);
- 3 • Communications with the CPSC about any gas can (RFPD 15, 21);
- 4 • All customer complaints about all Blitz gas cans (RFPD 17);
- 5 • Internal communications where any Blitz complaint was discussed
- 6 (RFPD 23);
- 7 • Documents reflecting potential need to change gas can design, generally
- 8 (RFPD 24);
- 9 • Home Depot's document retention/destruction policies from 2005
- 10 through 2015. These policies have nothing to do with the 2002 incident
- 11 (RFPD 26);
- 12 • All documents regarding flame arrestors, generally (RFPD 30);
- 13 • All documents regarding "safety cans" (RFPD 31);
- 14 • All consumer complaints about Blitz cans (RFPD 33);
- 15 • Videos showing Blitz cans (RFPD 35); and
- 16 • Videos showing Home Depot discussing Blitz cans (RFPD 36).
- 17

18 Again, to the extent any documents responsive to the above requests address
 19 "actual or alleged safety issues or explosions with plastic consumer gas cans
 20 (including complaints/claims/lawsuits alleging explosions with plastic consumer
 21 gas cans); the build-up of vapors inside plastic consumer gas cans that allegedly
 22 contribute to or cause explosions; and the use or nonuse of flame arrestors in
 23 plastic consumer gas cans" they have been or will be produced. But
 24 communications about shipping Blitz gas cans, or what color they should be, or
 25 complaints that a gas can leaked into someone's car trunk, or an injury because a
 26

1 gas can fell on someone's foot, are not relevant, and asking for such documents for
2 a 20+ year time frame is unduly burdensome and oppressive.

3 The following are documents that Home Depot has already agreed to
4 produce (with confidential documents pursuant to a protective order) or has stated
5 it does not have:

- 6 • RFPD 18: documents reflecting whether gas cans should have flame
7 arrestors. Home Depot has agreed to produce responsive documents,
8 once a protective order is entered.
- 9 • RFPD 25: documents regarding flow rate testing on Blitz gas cans: Home
10 Depot will not produce work-product privileged protected documents, if
11 there are any (i.e. expert work-product in other cases). Even so, flow rate
12 is not alleged to be a material issue to flame arrestors/explosions, so this
13 request is subject to the objections noted therein.
- 14 • RFPD 29: documents regarding flame arrestor testing: Home Depot will
15 not produce work-product privileged protected documents, if there are
16 any (i.e. expert work-product in other cases). That said, Home Depot is
17 currently unaware of any responsive documents.
- 18 • RFPD 37: testing showing gas cans not exploding: Home Depot will not
19 produce work-product privileged protected documents, if there are any
20 (i.e. expert work-product in other cases). That said, Home Depot is
21 currently unaware of any responsive documents.
- 22 • RFPD 41: studies regarding gas can explosions: Home Depot will not
23 produce work-product privileged protected documents, if there are any
24 (i.e. expert work-product in other cases). That said, Home Depot is
25 currently unaware of any responsive documents.
- 26 • RFPD 42: documents regarding gas can explosions and prevention.

1 Home Depot will not produce work-product privileged protected
2 documents, if there are any (i.e. expert work-product in other cases).
3 That said, Home Depot will be producing documents it believes are
4 responsive to this request once the protective order is entered.
5

6 CONCLUSION

7

8 Plaintiff Michael Montgomery respectfully requests that this Court:

- 9 1) overrule Defendant's boilerplate objections to RFP Nos. 3-8; 11-13;
10 15-45 and compel the production of all documents responsive to those
11 requests;
12 2) order that Defendant produce all responsive documents to RFP 1-2; 4-
13 6; 8; 11; 14-15; 18-25; 29-30; 34-38; 41-42, or confirm under oath
14 that such documents do not exist;
15 3) overrule Defendant's post-incident objections to RFP Nos. 3-8; 11-13;
16 15-26; 29-33; 35-37; 41-45 and compel production of all documents
17 responsive to those requests; and
18 4) order Defendant to produce those documents it is withholding based
19 on its inappropriate claims of privilege.
20

21 Defendant Home Depot respectfully requests that this Court deny Plaintiff's
22 Motion to Compel or defer hearing on the Motion until after the protective order is
23 entered and additional documents have been produced.
24
25
26
27

CERTIFICATE OF COMPLIANCE

The parties have complied with the local requiring meet and confer on this issue.

ECF CERTIFICATION

Pursuant to section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures of the United States District Court for the Southern District of California, I, Timothy J. Kingsbury, certify that the content of this document is acceptable to the undersigned counsel of record to affix his or her electronic signature hereto.

Pursuant to section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures of the United States District Court for the Southern District of California, I, Joshua S. Goodman, certify that the content of this document is acceptable to the undersigned counsel of record to affix his or her electronic signature hereto. I, Zach Tolson, authorize Plaintiff's counsel to use my electronic signature on this document.

DATED: June 17, 2015

Humphrey, Farrington & McClain P.C.
/s/ Timothy J. Kingsbury

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